

s.19(1)



Department of Justice / Ministère de la Justice
Canada

Ottawa, Canada
K1A 0H8

September 15, 1989

A
Brigadier General R.L. Martin, O.M.M., Q.C. C.D.
Judge Advocate General
National Defence Headquarters
Major-General George R. Pearkes Building
Ottawa, Ontario
K1A 0K2

Dear General Martin:

Re: [redacted] v. The Queen

I am writing to review with you the status of this matter and the implications of proceeding with the case in light of the impending replacement of the administrative order on which it is based, CFAO 19-20, with the new CFAO on inappropriate sexual conduct.

It seems to me that a number of considerations have to be assessed when examining the future management of this matter. Firstly, as I gather from Me Annie Côté, General Counsel with our Montreal Regional Office, the matter arose out of a search of the personal effects of [redacted] which search was described by counsel for the Defendant as potentially abusive. This search was followed by an interview which resulted in an admission by [redacted] that he was a homosexual and had had homosexual relationships with one or more persons. While we have not been provided with a transcript of that interview, which was taped, I am advised that it was both highly aggressive and unnecessarily intimate. Me Côté's assessment is that the record of the interview with [redacted] would be highly prejudicial to a successful defence of the action for damages. In addition, there is a risk that the manner in which the interview was carried out could lead to embarrassment to the Canadian Forces when it became public, as I anticipate it would in the course of litigation.

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Secondly, I understand that one of the main bases of our position to date in the Federal Court has been that [REDACTED] has failed to exhaust the grievance procedures available to him under the National Defence Act and that the civil courts should not, therefore, entertain the action. This issue is the subject of an appeal in the Federal Court of Appeal, which will not be heard for some time. However, I understand that [REDACTED] has completed all redress proceedings except consideration by the Governor in Council, and that he has written to the Minister of National Defence asking for a reference to the Governor in Council.

It appears, however, that the Minister has not submitted his grievance to the Governor in council in spite of the rather clear wording of QR & O 19.26 (6) which imposes upon the Minister the obligation to submit a grievance to the next level if "required" to do so by the complainant. Indeed, [REDACTED] even wrote a letter directly to the Governor General requesting her to review the matter. The reply he received from her office was that the Governor General could not intervene in the matter.

Finally, it seems to me that these proceedings have some connection with the proposed CFAO on inappropriate sexual conduct. As I understand it, the [REDACTED] case will ultimately turn on his challenge to CFAO 19-20 under section 15 of the Charter. I would anticipate that any action relating to current members of the Canadian Forces would proceed on the basis of the proposed order on inappropriate sexual conduct. It is foreseeable, in my view, that litigation relating to the new order would ensue, and I believe it would be desirable to consider the difficulty of litigating on the basis of the new order while the [REDACTED] proceedings under the old order remain outstanding. In addition, a finding by the courts that CFAO 19-20 contravened section 15 and was not saved by section 1 might have an adverse effect on the courts' reaction to the new one. It might be preferable to begin litigation on the proposed CFAO with a clean slate.

On balance, it is the view of counsel in our Montreal office and my own view that serious consideration should be given to settling this case. Such settlement would not have the precedential value that an adverse judgement on the constitutional validity of CFAO 19-20 would have. Certainly, a settlement need not be predicated on any acknowledgement of doubt about the validity of the order. Me Côté indicates that she anticipates that a settlement in the range of \$35,000. plus costs could be achieved.

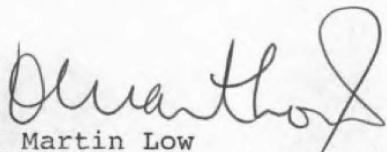
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Having regard to the work that is underway on the proposed CFAO, I would be grateful if you would consider the matter at an early date and let us have your position.

Yours sincerely,



D. Martin Low
Senior General Counsel
Human Rights Law Section

cc: Annie Côté

YC/gm

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